

Prosecutorial Discretion: Striving to Achieve Equal Justice

Saturday, October 15, 2005 from 8:30 a.m. – 10:00 a.m.

Panelists: Curtis Hill, Prosecuting Attorney of Elkhart County
Novella Nedeff, Clinical Associate Professor of Law, Indiana University School of Law-Indianapolis
Kristina Korobov, General Counsel, Strand Labs and former Chief of Sex Crimes Division of Marion County Prosecutor's Office
Barbara McConnell, Chief Deputy Prosecutor, Lake County Prosecutor's Office
Susan Carpenter, Public Defender of Indiana

Moderator: Adrienne Meiring, Staff Attorney, Division of State Court Administration

Scrivener: Morgan Nunley, J.D. Candidate 2008, Indiana University School of Law – Indianapolis

Outline of Subjects:

Diversity Issues Facing Prosecutors
The Prosecutor's Role in Combating Racial Profiling
Charging Decisions and Plea Agreements - Cultural Differences & Immigration Status
The Role of Race in Sentencing

What is the #1 diversity issue facing prosecutors today?

Curtis Hill: It's important for the prosecutor's office to be a reflection of the community; how the office is staffed is important with the concepts of solid and fair justice.

Novella Nedeff: The number one diversity issue facing prosecutors is the public's perception of the legal field; the public feels there is racial inequality.

Kristina Korobov: Once there were only two Americas – black v. white; now there is poor v. rich. We need to develop prosecutors who understand this concept and how it affects justice outcomes.

Barbara McConnell: The number one priority is bringing in trained minorities on staff; there is an initial attraction of qualified minority applicants, but it is difficult to retain those individuals due to underpaid salaries for prosecutors in general.

Susan Carpenter: *(read from one of the focus group summaries from the 2002 Executive Report of the Commission on Race and Gender Fairness)* - The consensus items from the focus groups reflected that race, gender and socio-economic bias are subtle and evasive, but effective. The public perception is that the judiciary and

police are unfair to African-Americans and Hispanics in relation to arrests and that routinely the majority of traffic stops are of African-Americans with Caucasians less likely to be sent to jail.

Do you think racial profiling exists in traffic stops or is there just a public perception that it exists?

Barbara McConnell: It does exist. It exists through economics in traffic stops, etc. In Lake County, the prosecutor's office puts on seminars on sensitivity training to educate their officers and is active with police chiefs, meeting them to provide information that may prevent such issues.

Curtis Hill: It depends on how you define racial profiling - legitimate profiling of criminal activity may at times include race as one of a number of characteristics (i.e. profiling criminal activity of Hispanic gangs in the area) - this is a proactive approach to crime that just so happens to be racially imbalanced.

Novella Nedeff: Gangs exist and there are gang problems, but it makes things easy for racial profiling to go on. Late 90s had junk social science going on -- many of her clients were assumed to be gang members, and the prosecutors labeled them as "possible" gang members. These men had unfair dangers assumed upon them. She hopes that prosecutors are able to re-label these clients.

When screening charges at the prosecutor's office, were there things that may have made you look twice that suggested racial profiling had occurred?

Kristina Korobov: Shoplifting in certain areas - why were they followed? Traffic stops are a big thing to look through. As a prosecutor, it is necessary to have the years of experience behind you so you can better screen and stand on your own to talk to the officers and figure out what is behind the stops and if it is something more than mere law enforcement.

How should the prosecutors react when they find inappropriate patterns?

The elected prosecutor in the county should educate personnel how to screen issues and what to look for. Also, there should be a system in place so that once it's spotted the screener knows where to go. Most people are intimidated.

Barbara McConnell: Her screening personnel are vastly experienced and know how to look for these issues as well. They also take part in sensitivity training; it is necessary to be able to talk about the issues.

From a defense perspective, if you could create a wish list for how prosecutors deal with the issue, what would it be?

Susan Carpenter: Accurate data is needed. Until we have this, we don't even know what we're dealing with, at least the heart of the problem.

When prosecutors are making charging decisions, are there ever instances when you think cultural differences of ethnic/racial groups should be considered?

Curtis Hill: No. We must look at a charging decision from the standpoint that cultural and racial differences do not come into play. They may affect sentencing decisions and plea agreements but not initial charging decisions.

Novella Nedeff: Occasionally in charging decisions, cultural differences should be taken into account when considering the facts of the situation. But, usually, what should be looked at is: 1) what happened, and 2) what can be proven on the basis of the evidence. Sometimes deputy prosecutors are pressured to ignore those racial considerations/cultural differences.

What do you do if you don't have a prosecutor able to make those decisions because he or she is a novice?

We must go to their supervisors in order to make sure that the prosecutor's office is considering the true background of the person being tried. Childcare is a good example of needing to have some alternatives to teach other cultures rather than exposing them to the criminal justice system (i.e. through neglect charges).

Curtis Hill: *(an example of sexual misconduct with a minor given)* - Such a situation may be accepted in Mexico but not here in Indiana. That person should not be allowed to get away with the crime here in Indiana due to cultural differences because it offers them a lesser standard than our own citizens. It is the prosecutor's responsibility to treat everybody as fairly and as equitably as possible.

Susan Carpenter: "Treat like cases like and charge different cases differently." Sometimes intent is a really important and cultural differences are important to understanding intent. For example, public intoxication - when you get pulled over by a cop in Mexico, you pay him. That is a huge difference that the two cultures do not agree on.

Audience comment: Are these rules that are put into place merely arbitrary? Is this because the rules are the way that they are because we say so? And if that is the case, why shouldn't we consider cultural differences?

Curtis Hill: The General Assembly institutes these rules, and we use them. We're not trying to institute some form of social reform - we take all of those factors into consideration, but we cannot use the cultures to prescribe how we arrive at the disposition.

Audience comment: These cultural differences may be applicable with crimes that do not involve intent. However, all of the crimes talked about in the examples involve

intentional crimes which, despite cultural differences, generally are prohibited no matter what culture you examine.

What about cultural differences affecting a victim's actions? How should prosecutors deal with that situation? (for example, fear of some Hispanic women of coming forward in domestic violence situations due to cultural concerns about the role of the male in the family)

Barbara McConnell: At some point during the various stages of the justice process, the cultural issues of the defendant and victim will be considered, such as during plea negotiations, but not at the charging phase.

Curtis Hill: His office is sensitive about these issues (dealing with cultural differences among victims), but they look at it on a case-by-case basis in order to administer justice fairly. There is a fear not only of deportation in other cultures, but in certain male-dominated religions and cultures, there is also the fear by victims of having their children taken away.

Can prosecutors do a disservice to racial and ethnic groups by allowing cases to be repeatedly dismissed due to these fears?

No, but it is important to reach out to the community to strengthen the bond between the prosecutors, police officers and the individuals in the community so that these victims will begin to feel that they can trust prosecutors and police officers.

Should prosecutors ever consider the immigration consequences of convictions when making charging decisions or plea agreements?

Susan Carpenter: Prosecutors should consider some of the greater impact that decisions in charging can have in deporting some people who are here for economic advantages and whose families totally depend on them financially.

Barbara McConnell: Is the crime serious? Is the crime something that should receive a felony charge or it is something minor?

Curtis Hill: When people are here illegally, he does not necessarily consider this to be a mitigating factor. We should charge according to whether the crime is significant or not. To make a plea recommendation simply so that someone is not deported allows non-citizens to be held to a lesser standard than our actual citizens, and that is not administering equal justice.

What about the situation abroad in which the American citizen was ordered to be caned? Under their rules, this issue cannot be addressed from our vantage point.

Barbara McConnell: Agreed. The cultural differences and standards in place in a country are those country's standards, and the punishment is the law of the land.

What about mandatory sentencing policies - how do such policies affect diversity?

Novella Nedeff: Any policy cannot cover every situation (account for cultural differences, immigration consequences, etc.). Prosecutors should still consider all the factors and the character of the defendant.

Barbara McConnell: *How do you train new attorneys about sentencing policies within the office?* Lake County Prosecutor's Office has certain types of cases that are considered "no plea" cases due to the nature of the cases. Deputies should seek out more experienced deputies in order to become educated in how and when to consider other factors.

Susan Carpenter: *Do mandatory sentencing policies in a prosecutor's office concern you?* There is an enormous impact, and these policies vary statewide. A policy in a rural county could provide that a defendant gets twenty years for breaking into an ex-wife's house when no one gets hurt - in other places, that same defendant would only receive anger management classes. In other instances, like with the case of diversion, those who are able to pay for the mandatory fees will get the opportunity to wipe that misdemeanor from his or her record while those that cannot won't get that opportunity. There are huge differences in sentencing; it seems that those who have more going for them do get the breaks, but for those individuals who do not have as much going for them (i.e. a job, good family background, etc.), the context of their situations often is not weighed.

Barbara McConnell: *Should prosecutors be concerned about these issues or are the sentencing issues in the hands of the judges? How should prosecutors deal with sentencing issues/disparities relating to race, socio-economic status, etc?* It is something her office tries to think about every day because the reality is that about ninety percent of the people sitting in the courtroom on any given day are black males.

Was anyone surprised with the Indiana Criminal Justice Institute report which indicated that to the extent that race played a role in death penalty sentencing, it was the race of the victim that mattered, not the defendant (defendants who killed white victims were more likely to receive a death sentence than defendants who killed non-white victims)?

Curtis Hill: Not surprised, yet he finds it interesting because it suggests that there is some sort of a devaluing of certain types of victims and what they might be worth.

Susan Carpenter: This is consistent with data throughout the U.S. The likelihood is very high that the killer of a non-white person will get off easier in sentencing, and the inverse is true as well.

Audience Comment: Why aren't these issues of race and culture addressed as a weighing factor for the prosecutor to consider (when making the decision to seek the death penalty)?

Panel Response: There are phases that a defendant can request that jurors take into account the mitigating and aggravating circumstances.

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Barbara McConnell, Chief Deputy Prosecutor, Lake County Prosecutor's Office
Susan Carpenter, Public Defender of Indiana
Barbara Crawford, Screening Supervisor, Marion County Prosecutor's Office

Moderator: Adrienne Meiring, Division of State Court Administration

Scrivener: April Shaw, J.D. Candidate 2008, Indiana University School of Law – Indianapolis

Outline of Subjects:

Diversity Issues Facing Prosecutors
Keeping Demographic Statistics on Charges Brought
The Role of Race in Sentencing

What is the #1 diversity issue facing prosecutors today?

Curtis Hill: It's important for the prosecutor's office to be a reflection of the community; how the office is staffed is important with the concepts of solid and fair justice.

Novella Nedeff: The number one diversity issue facing prosecutors is the public's perception of the legal field; the public feels there is racial inequality.

Kristina Korobov: Once there were only two Americas – black v. white; now there is poor v. rich. We need to develop prosecutors who understand this concept and how it affects justice outcomes.

Barbara McConnell: The number one priority is bringing in trained minorities on staff; there is an initial attraction of qualified minority applicants, but it is difficult to retain those individuals due to underpaid salaries for prosecutors in general.

Susan Carpenter: *(read from one of the focus group summaries from the 2002 Executive Report of the Commission on Race and Gender Fairness)* - The consensus items from the focus groups reflected that race, gender and socio-economic bias are subtle and evasive, but effective. The public perception is that the judiciary and

police are unfair to African-Americans and Hispanics in relation to arrests and that routinely the majority of traffic stops are of African-Americans with Caucasians less likely to be sent to jail.

Barbara Crawford: Prosecutors must be aware of what the community consists of, and the prosecutor team should keep in touch with the community to help address its issues.

What do you think would be the reaction of prosecutors if asked to keep statistics on race/ethnicity of individuals charged/not charged? Is this a good or bad idea?

Curtis Hill: Idea may be good for gathering information, but then there is the resource issue. Technological improvements may help gather that info faster and less costly. He doesn't think any prosecutor would object to such an improvement, but it is not an easy fix. As long as it is not a resource issue (depending on how far you are going to take the reporting), then prosecutors should not care if simple demographic information is reported.)

Barbara McConnell: Prosecutors should not be afraid to take down such information.

Barbara Crawford: They should have no reason to object.

Kristina Korobov: There needs to be an explanation of cases in detail, and there is a need for more stats at the misdemeanor level because it is the entrance point for many career/violent offenders.

Susan Carpenter: Probably want to include prior record as well. The only thing quantifiable is objective factors, but demographic statistics will not explain why a prosecutor did what the prosecutor did. She suggests evaluating the information and policies that we have now.

Charging Decisions - Does racial profiling exist or is there simply a public perception that it exists?

Barbara Crawford: What do we mean by "racial profiling"? In terms of the law, stops are not considered pretextual so long as there is some other valid reason, besides race, as to why the person is stopped. If race is the only reason for stopping someone, then she agrees this is a problem, but if it is one of the factors, then no racial profiling.

Novella Nedeff: Racial profiling does exist. Rarely is it as blatant as race or ethnicity being the only reason a person is stopped - more subtle than that. What about a broken tail light at 3 a.m. or failure to use a turn signal - it is easy to disguise what's actually going on - racial profiling. U.S. Supreme Court precedent, however, provides that as long as the person did not use the turn signal, then the stop will be valid. The problem occurs when a disproportionate number of racial/ethnic minorities are targeted for enforcement of minor violations, just to stop those individuals. She

doesn't expect prosecutors to excuse serious cases because of potential profiling, but prosecutors need to team with police on the street -- the system should be concerned when minority individuals have been stopped and fall into the justice system, believing again that the system is biased.

Susan Carpenter: Education is a primary tool. We need to provide sensitivity training to police and staff. It is the obligation of prosecutors to pass on information to police officers and to track disparate/discriminatory patterns. There are patterns that cannot be ignored.

Question from the audience - what exactly do you consider a pretextual stop?

Hypothetical example given -- Officer X is routinely making stops in a diverse neighborhood and stopping only Hispanics? What should be done? What should the prosecutor do?

Audience response: You have to address the occurrences of "bad apples"; don't be afraid of it. Prosecutor should be put on notice as his/her job is justice.

Audience response: Audience member (a police officer) agrees that a 19-year-old black is more likely to be stopped than a 65-year-old white, but he believes in general that officers do not stop individuals due to race.

What should a prosecutor's role be with respect to the issue of racial profiling if it is a public perception problem (rather than a reality)?

Curtis Hill: If there appears to be a problem, then the prosecutor should track the history/situation of an officer with the suspicious stop activity and review it with the officer's chief. We have to hold others accountable and address problems, but we also have to ask what is racial profiling -- he supports criminal/suspect profiling. Prosecutors' offices need to be more proactive and assist in training of officers to prevent racial profiling, but we also need to educate the community about the type of profiling that is acceptable (profiling criminals/suspects). If people see it is not *race* but *activity* that is being profiled to provide security, this will help alleviate part of the perception problem.

Susan Carpenter: We need to keep statistics on all stops, not just arrests. There has to be more detail on the stops other than just the race of the individual stopped.

Audience Response to question: "How do police officers feel about taking demographic statistics on traffic stops?"

Audience Response: It's a resource issue -- data is going to be skewed because manpower or resources are not available -- only those areas with manpower will report.

Will collecting demographic information help with the public perception about racial profiling?

Curtis Hill: If the perception is that racial profiling exists, then theoretically that becomes the public's reality. However, a lot of resources/manpower may be expended on getting statistics with no impact on public perception.

What about the role of race in sentencing and the public's perception about the interplay between these items -- would keeping statistics improve the public's perception?

Susan Carpenter: No amount of statistics can remove perception that sentencing is different for racial minorities -- statistics currently available are bad.

Barbara Crawford: Perceptions will not be changed; statistics are valuable for the justice system though.

Barbara McConnell: It does seem that black-on-white crime is more likely to get the death penalty from jurors.

Based on the information available (Indiana Criminal Justice Institute Death Penalty Sentencing Report), it seems that there is a disparity on when the death penalty is imposed, correlating with the race of the victim (more likely to get death penalty if victim is white) -- what do you think accounts for this disparity?

Kristina Korobov: Public often doesn't seem to "care" about minority victims as much as white victims. It is the stereotypical crime (i.e. stranger attacks) that get media attention, and if the media doesn't demand it, then the death penalty often is not pursued. We need to change public perception -- victimization is about being human, regardless of race or ethnicity.

If we assume for a moment that the public (aka potential jurors) seems to devalue certain types of victims more than others, what is the role and responsibility of the prosecutor in changing this situation?

Barbara Crawford: The role and responsibility of a prosecutor in a case is not to make the race of the defendant or victim an issue; instead, decisions should be made on the strength of the case.

Novella Nedeff: There still exists some indirect racism, and it plays out in whether a jury is willing to inflict punishment for killing a certain type of victim.

Jury Trends and Innovation

Saturday, October 15, 2005 from 8:30 a.m. -- 10:00 a.m.

Panelists: Tom Munsterman, National Center of State Courts
Judge John R. Pera, Lake Superior Court and Member of Indiana Jury Committee
Judge William J. Hughes, Hamilton Superior Court and Chair of Indiana Jury Committee

Moderator: Judge Gerald Zore, Marion Superior Court

Scrivener: Annalisa Perez, J.D. Candidate 2008, Indiana University School of Law - Indianapolis

Outline of Subjects:
National Trends
Panel Lists in Indiana
Recent Rule Innovations in Indiana

National Trends (Tom Munsterman)

Diversity and Juries: How diverse is the jury? The idea of diversity isn't exactly "we want people from the community and then there has been exclusion of people in juries." We want our juries to be representative of us.

Examples of where people are *excluded* from juries are in Russia and Spain. In Spain, they decided to put jury trial back in 1996 but had concerns with specific groups because they weren't exactly "like the community."

The concept of having a jury has been around a long time before we had diversity. The most famous movie depiction of juries is "Twelve Angry Men." For the hundreds of years that we have had trial by jury, we have gone a long time before we started bringing in diversity.

So what do we look at to create a list? Voter Registration List? Drivers' Licenses?
When trying to create a list that gets everyone onto the lists, the above sources are not as accurate.

Other areas when dealing with juries are topics such as payment, amount of time between required service, removing exemptions, picking a new date, and working with potential jurors to make it most convenient for them to serve. This has been implemented in Houston, Texas. These issues being worked on are resolved with "principles" not "standards."

A "principle" is inspirational.

A "standard" is the minimum that you have to reach.

The following movements are occurring nationally with respect to juries:

- 1) Broadening jury lists - looking to addresses
- 2) Trying to get private employers to pay for jury service
- 3) Trying to lessen time served on a jury
- 4) Eliminating exemptions to jury service

Jury Patriotism Act: one day, one trial -- establishes a fund for jurors that are in long trials. Financial hardship is an important factor that needs to be solved.

Audience Question: Are there any statistics on the cost of jury trials?

Answer: In terms of a jury's loss in total, it isn't too hard to figure. You can ask each juror how much he or she lost, but that will change from jury to jury.

Panel Lists in Indiana (Judge William J. Hughes)

Blue ribbon commission looked at "where should Indiana courts be?" One area was jury reform. From that commission, modifications were suggested that became effective in 2003. There are 30 rules from selection of a jury to deliberation to excusing a jury.

Making jury service more convenient, more inclusive, and using different lists for pulling in jurors besides just voter registration were areas discussed to increase diversity in juries.

Some rules that were not well received:

- Qualification
- Exemption
- Referral

There is some concern about exclusion and how to deal with individuals who are physically challenged and are at the courthouse for jury service. There is a struggle working with existing rules and finding a way to assist judges in order to enable those with challenges to work well with the rest of the jury.

Exemptions: Indiana has a lot of exemptions. There are 3 statutory configurations that all have slightly different exemptions. For example, Indiana exempts school board directors but not educators. There are arguments that exemptions should be removed completely. Since 2005, there has been a push in Indiana, through different legislative bills, to remove exemptions.

In the last year, new major jury rule changes:

Rule 20: permits jurors to discuss the evidence as it is presented so long as they are all together and don't come to a conclusion. This has not created a huge problem, and it now appears that there are less questions on the jury's part.

Rule 4: changed how we choose jurors and send them notice -- a consolidation of the 2-tier system.

1-tier system -- one notice from the court to fill out a questionnaire and return it day the person has been selected to serve.

2-tier system -- one notice to fill out a questionnaire and send it in followed by another notice indicating the date of service.

Beginning on January 1, 2006, questionnaires to be filled out, notifications of inability to serve on certain dates, etc. will be available via the internet (email). Currently, Indiana is working on a method of electronic signature. Yet at the same time, even with these innovations, Indiana will never go to the point where all you have to do is get notifications through the internet.

To improve diversity, look at the jury rules as they exist now, look at how they are implemented, and then work on them:

Make it easier for *everyone* to serve on a jury

Create a broader section for selecting jurors

Reduce the hardship on those who serve on a jury --

There is a statute of the maximum a court can pay jurors and it typically is not enough -- \$40.00 doesn't cut it. Some counties pay for food; some do not. Different counties do different things. Parking also is another difficulty. These are just a few examples of the difficulties that may impact diversity. What the Indiana Jury Committee is trying to do is work on a way to standardize jury payment across the state. One of the problems with that idea though is that the money to pay jurors comes through county funding.

Audience question: This rule that allows jurors to discuss the case prior to deliberation "as long as they reserve judgment" -- has it created conflicts with the language about not "forming and expressing an opinion about the case"? Why doesn't the language mirror each other?

Answer: I don't know that the Indiana Jury Committee looked at the wording specifically. Most definitely, something like that will be looked at. However, there haven't been any problems. We are careful in instructing jurors with the new instruction that they need to wait until they hear everything before forming an opinion. Research has shown that jurors really don't lock into a decision and refuse to change their minds; they really do take all of the evidence in.

Recent Rule Innovations in Indiana: Getting People to Come In and Serve on Juries (Judge John Pera)

Where Indiana has been: in 1975, Judge Pera seems to recall that jurors were selected from property owners in the county. Somewhere along the line, property owners weren't representative of the community, so there was an effort to try another list. That's when use of the voter registration list occurred. It started in the early 1970s but wasn't readily used. With the voter registration list, you know that the prospective juror is eighteen at the very least. However, we now recognize that the voter registration list may not be the best to use, so the Indiana Supreme Court, with adoption of Jury Rule 2, requires selecting names from all lists of voters and supplementing that list with one other list. Most counties have supplemented the voter registration list with a data list from the Indiana Department of Motor Vehicles. The problem with that, members of the Indiana Jury Committee thought, is that the voter registration list hasn't been purged in years. In some cases, there are multiple entries for essentially the same person.

So beginning on January 1, 2006, the voter registration database will no longer be used to compile a jury pool in Indiana. Instead, the Department of Revenue list and a Department of Motor Vehicles list will be used. How do we know that the list is valid or more accurate than previous lists? The Indiana Jury Committee examined census data for Indiana in total and for several test counties specifically. The Indiana population is relatively stable. The population of the test counties is stable enough so that the jury committee could go to the bureau data and see statistics of those who are 18 and older. In comparing the list with prospective jury lists and looking for those 18 and above, the Committee encompassed about 95% of people accounted for in census data. The Jury Committee hopes that the new list will encompass the broadest and most accurate representation of individuals within the state.

The accuracy ability of the new list solves another problem – before, Indiana courts were sending out mass mailings of questionnaires, only to have 40% returned due to invalid mailing addresses.

Also, a person can now go to the jury administrator and see if he or she is in the database. If the person isn't, then he or she can ask to be added. When a person isn't in the database, it is a wonderful opportunity to see why not if the person has a driver's license and pays taxes.

Ultimately, the new rules aren't a "perfect fit", but these are some of things being done to prevent an incomplete jury panel list.

Audience Comment: There are members from the Hispanic community that cannot be on a jury because they do not know English fluently enough to qualify as a juror.

Response from Panel: If there is a language barrier, that is disqualification in Indiana. Currently, there are not enough certified interpreters, and there isn't enough money to provide interpreters for a potential juror who doesn't fully understand English. However, that situation may change. Through the ADA (Americans with Disabilities Act), there is case law requiring an interpreter for a juror with a disability – the interpreter becomes a part of the jury – in essence, a thirteenth juror. In fact, in New Mexico, their rules are such that no person can be deprived of the right to vote or right to serve on a jury based on not being able to speak English.

Audience Question: What about jurors who have a hearing impairment or vision impairment?

Response from Panel: There have been incidents where these impairments have been accommodated in a manner that the affected juror and fellow jury members were comfortable with.

Audience Comment: It seems as though it went from trying to create a list that represented the community to getting a list with accurate addresses.

Response from Panel:

The Jury Committee isn't trying to correct an address problem with the new list; the committee was trying to get a cross-section of the community. The new database should be a wonderful enhancement with the added benefit of having accurate records. The Department of Revenue list and a Department of Motor Vehicles list will eliminate the people who have moved and avoids the situation of sending out correspondence to people whom we have lost contact.

Jury Trends and Innovation

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Judge John R. Pera, Lake Superior Court and Member of Indiana Jury Committee
Judge William J. Hughes - Hamilton Superior Court and Chair of Indiana Jury Committee

Moderator: Judge Gerald Zore, Marion Superior Court

Scrivener: Amanda R. Wishin, J.D. Candidate 2008, Valparaiso University School of Law

Outline of Subjects:
National Trends
Panel Lists in Indiana
Recent Rule Innovations in Indiana

National Trends (Tom Munsterman)

Changes with jury rules are recent. Only as of 1975 that women couldn't be exempted from jury service. Only as of 1985-1986 that attorneys couldn't exclude African-Americans from jury service.

Nationally, changes to jury rules have centered around the theme: how do we make it feasible for everyone to serve?

ABA Standards for Jury Rules (which are aspirations as opposed to minimums that must be reached) include the following:

- Juries must be unanimous
- Juries must be composed of 12 persons
- Over ½ of states have gotten rid of exemptions to jury service
- Potential jurors must have a right to postponement of service

Concept often heard about jury service, "everybody loves jury duty, but not this week." Need to use the broadest possible list to get the job done.

All changes being done nationally make it feasible for potential jurors to serve. The only thing left to consider is the financial aspect of jury service.

- A number of courts nationwide ask jurors to donate the money they are entitled to for jury service; 1/3 of potential jurors give the money back
- Nationally, there is a problem of figuring out how to take the money and put it where the hardships appear to be.
- "Lengthy trial fund" – A fund being utilized in Arizona. Jurors get the difference between what the court pays and their salary if the trial is longer than 4 days. Individuals who usually would be excused now can serve.

Panel Lists in Indiana: Discussion of some of the 30 jury rules of Indiana, effective January 1, 2003 and how those rules fit in with the 19 principles of the ABA (Judge William J. Hughes)

Indiana is occasionally first, rarely last, and frequently early.

The jury rules come from a process that began in the early 1990s when it was discovered that jurors were leaving jury service with bad impressions. The goal of the Jury Committee was to make jury service more inclusive, to increase positive impressions with jury service, and to make it easier for people to serve.

Highlighted Indiana Jury Rules:

- Rule 2 requires a more inclusive jury panel list.
- Rule 3 got rid of the practice of pulling people off the street as potential jurors if a court ran out of people from the jury panel.
- Rule 4 made it easier for individuals to be selected for jury duty.
- Rules 5 (disqualifications), 6 (exemptions), and 7 (deferrals) might be changed in Indiana.
 - o Indiana Jury Committee working on getting rid of exemptions and making it easier to get deferrals.
- Rule that is of the most concern is Rule 10 – Confidentiality of Juror Information.
 - o Jurors want to ensure that their personal information is tightly held.
 - o Jurors do not want the individuals on trial to contact them.
 - o The media is now reporting the names of jurors.
 - o Now, jurors are called by number rather than name.
- Rule 20 allows jurors to ask questions.
 - o This rule has been found not to be disruptive.
 - o Jurors leave more satisfied with jury service as they have the information they need to make a decision.

New Changes:

- Rule 4, effective January 1, 2006, is at the forefront for communications with juries.
 - o One or two-tier system
 - o Allows jury administrators to collect information electronically: by phone, internet or computer kiosk in the courtroom
 - o System the courts selects must have an electronic signature mechanism
 - o Courts can't get rid of the old way of doing things; they just must also take the information by other ways as well.
- Rule 20, effective January 1, 2005, requires an instruction to all jurors that they have the right to talk about the case before deliberations. This rule is conditioned on the following factors: jurors must all be together; jurors must be in the jury room; they cannot come to a conclusion; and no one else, besides the jurors, may be in the room.
 - o There has been no change in conviction rates since the rule was implemented.
 - o This rule may make jury decisions occur more quickly

- However, this could be because of the written instructions, or it could be because the jurors have gotten to know each other and been able to analyze the evidence as they go.
- Where Indiana is going with jury rules:
 - Goal is to make jury service easier, more inclusive, and a better experience for those who serve.
 - Exemptions: debate on whether Indiana should have exemptions or not
 - Examining disqualifications based upon ability to read and write the English language - how do we deal with this issue?
 - Post-jury conversations: debate on whether to allow or not.
 - Compensation for jurors: woefully inadequate, but there are other methods of compensation that vary between counties (i.e. paying for lunch during jury service).

Recent Rule Innovations in Indiana: Getting People to Come In and Serve on Juries (Judge John Pera)

Why is diversity important when talking about juries?

Audience Response: It increases confidence in the justice system; it's a credibility issue. Credibility is very important.

Until the 1970s, jury pools in Indiana used to encompass only those individuals who owned real estate. Then jury pools were selected from voter registration lists: at least then courts knew that everyone coming in for jury service had to be above 18 years of age.

The goal of the jury rules is to broaden the database. Since January 1, 2003, the jury rules obligated every county to use voter registration plus one other list (BMV, utility bills, telephone company, etc.)

- Most counties use BMV and voter registration.
- Voter registration has been found sometimes to be inaccurate. It is wasting money to send jury summons to inaccurate addresses.
- One of the goals with the new jury rules was to find an accurate list with the greatest cross-section of the community without duplicates.
- New system is going into effect on January 1, 2006.

Rule 2 now will provide that counties can only use a list approved by the Indiana Supreme Court. Currently, the database is created from Department of Revenue records and BMV records.

- This change has been accomplished due to the Indiana Supreme Court being interested in jury reform.
- It is difficult to determine if this list is a *true* cross-section by comparing to U.S. census numbers; however, according to the 2000 census, Indiana has a population of 4,506,089 and the statewide master list has 4,503,032 names on it. That's a close proximity.

Audience Question: What about the argument that by using the voter list courts were getting the people most interested in government, but with the reforms courts are starting to get people who don't want to be there and are not taking jury service seriously?

Panel Response: Often, it is the most unwilling that makes the best soldier. It's a duty to be performed. We are all called to make sacrifices for the community. Most of the people who serve as jurors end up enjoying being there.

Audience Question: Are you still getting the same quality?

Panel Response: There are still preemptory challenges and challenges for cause. With those individuals who really don't want to participate, there is a way to remove them so that they are still not jury members.

Audience Question: Who are you missing now with the tax and BMV lists?

Panel Response: We are now missing those individuals that don't pay taxes and don't drive. It is also a cost thing – counties waste money sending out summons that are returned.

Audience Question: I am concerned about getting rid of the exemptions and putting the burden on the defendant to use preemptory strikes. Would there be more preemptory strikes?

Panel Response: We don't think the exemptions are as necessary as before because of the deferrals. We also need to look at the qualifications for jury service to see if there is a way to address those individuals who are not part of the jury pool yet maintaining fairness so that the parties can have their case adequately considered. In specific cases, you can sometimes exclude individuals due to qualifications, even under the ADA rules. However, challenges for cause may be construed differently. One of the things that came out when examining the jury system in Indiana was that people were offended that individuals were excused. It seemed to hurt public confidence in the system.

Recruiting and Retaining Minority Law Enforcement Officers

Saturday, October 15, 2005 from 8:30 a.m. – 11:30 a.m.

Panelists: Officer Shari Ramey, Recruiting Coordinator for Lexington Division of Police
Andrew Morabito, Senior Project Specialist for the International Association for Chiefs of Police

Moderator: Magistrate Jill Reifinger Marcrum, Vanderburgh Superior Court

Scrivener: Ok Hee Bae, J.D. Candidate 2007, University of Notre Dame Law School

Objective: Discuss strategies to improve hiring and retention of female and minority law enforcement officers.

I. Introduction

1. Why do we want women police enforcement officers?
 - Equal responses
 - Reflect the community
 - Demonstrate that women are not outsiders
 - Expand ideas and prevent one mindset
2. Why won't women join the police force?
 - Perception about female officers is that they won't be given the same opportunities
 - Fear of what this job entails: Can I do this? What is going to be the cost for doing so?
 - Lack of understanding about the job: in reality, 50% of police officers have not used a gun during the course of their duties.
3. What is "Diversity"?
 - A. Inclusion: including everybody in the community
 - Who's able to do the best job? - It can be a woman. In certain situations, you can relate to someone because of who the person is.
 - If we have the best opportunity to include ideas that would help people to understand the situation, we need to include everybody to get all the ideas.
 - It can reflect community well and expand ideas in the police department.

II. Lexington Case and General Approach

1. Situation in Lexington Division of Police
 - A. Women still make up a small portion in the whole police department.
 - B. In Lexington, there are 5,000 illegal aliens.
 - C. In 1999, the division of police decided to expand the law enforcement position in order to draw more individuals from the community.
 - D. Now there is no need of a college degree in order to become a police officer, but the individual does need to have a high school diploma or GED to be a police officer.

- The concern is that requiring a college degree will reduce the number of minority applicants.
- E. Required testing
- Pass or fail written test
 - Physical fitness test
 - Oral test
 - Polygraph/ Background review
- F. Minority Recruitment Strategies in Lexington County
- Visiting military bases, schools in east Kentucky, and job fairs
 - Law enforcement expo: let women explore the position by having them undergo a physical fitness test or tasks that would be given to women police officers
 - Local minority clergy involvement
 - Formed a minority recruiting committee
 - Conducted focus group research to determine minority attitudes about policing as a career choice
 - Advertised in media
- G. Problems in the recruitment
- Need to spend more money in media and allocate more budget
 - Need a dedicated person in the recruitment
 - Negative media attention
 - Lack of adequate minority representation
 - Lack of trust within the minority community
2. Why is Minority Recruitment Important?
- Community trust – not every crime is reported
 - Comparison of community response to critical incidents
 - Increased diversification shows decreased misconduct
3. Why is Minority Recruitment Hard?
- African-Americans: historical problems with the police
 - Women – lack of marketing: many people still have aggressive, authoritarian images of police officers
 - Recent immigrants/ Ethnic minorities
 - a. language barriers
 - b. various immigration patterns
 - c. differences within minority groups
4. Methods to Improve Diversity
- A. Building Block Activities
- Diagnose recruitment population: conduct the market survey and identify recruitment targets
 - Diagnose HR system: assess the selection process looking at the numbers, conduct the adverse impact study, self-evaluation, and test each step of the process
 - Assemble Best Practices Inventory: recruitment/selection/retention
- B. Stakeholder Action Planning
- Mobilize community and government stakeholders

- Conduct orientation engagements
 - Conduct building block activities/information engagement
 - Conduct implementation engagement sessions: work to modify problem-solving activities
- C. Strategy implementation, monitoring, and evaluation
- Implement action initiatives
 - Monitor implementation activities
 - Evaluate action initiatives
5. Potential Pitfalls
- Buy-in from political, union and community leaders: without political and union leaders, any initiatives are likely to fail
 - Scheduling difficulties: police and community “ideal” meeting times and locations rarely coincide
 - Failure to follow-through
 - Failure to dedicate resources
 - Shared responsibility: both the community and police have a stake in the outcomes when tackling minority recruitment problems.
6. Elements for Success
- Involvement of key stakeholders, including a cross-section of the police agency
 - Commitment and contribution from police management and labor and other government players with a role in the selection process (e.g., Civil Service, Human Resources Department)
 - Results orientation: if the programs or tactics devised are not achieving the desired increase in minority representation, those involved should attempt to understand why and devise remedies
 - Active engagement of community

III. Conclusion

Today the police profession needs the tools necessary to identify and select individuals that have the capacity for accomplishing the broad set of tasks related to homeland security, crime, and disorder. It is time to focus on human resource issues for the law enforcement community. To do this, we need to have more dedicated people and modest funding levels for research and information dissemination to redress problems in minority recruitment.

Improving Diversity in Legal Education

Saturday, October 15, 2005 from 8:30 a.m. - 10:00 a.m.

Panelists: Susanah Mead, Interim Dean for Indiana University School of Law - Indianapolis
John Applegate, Executive Associate Dean for Academic Affairs and Walter F. Foskett Professor of Law - Indiana University School of Law - Bloomington
Vernellia Randall - Professor of Law and Director of the Academic Excellence Program for University of Dayton Law School

Moderators: Judge Ezra Friedlander, Indiana Court of Appeals for the Second District
Jana Matthews, Staff Attorney, Division of State Court Administration

Scrivener: Shelbie Byers, J.D. Candidate 2008, Valparaiso University School of Law

Why is diversity important in legal education?

Susanah Mead: It is important to have representation in all aspects of the legal community so that when people encounter the various legal systems they feel represented and see others in places of influence that look like them.

John Applegate: The law cannot ignore a commitment to diversity. The legal system, both externally and internally, needs to promote diversity. Law school is designed to have an impact outside the walls of the school. The legal education system cannot move forward with a commitment to the community without improving diversity within. Diversity is important in legal education because a diverse student body makes for a better education. A class that is made up of a diverse group is much more stimulating than one that is not. Diversity in law is important because it prepares students for the real world that we live in.

How can we achieve diversity in law schools? How important is the LSAT score? What process does the law school undertake to recruit minority law professors?

- Law schools in Indiana regularly host the ICLEO program.
- IU - Indianapolis offers its own summer start program to help students that have low LSAT scores and/or grades prior to entering law school.
- Students in both programs (ICLEO and the IU - Indianapolis summer start program) usually find that their numbers are not indicative of their success in law school.
- Admissions offices have an obligation to admit only students that they believe will successfully complete the legal program. The problem is that there are more qualified applicants than seats available. The LSAT scores are important because they are indicative, but there are choices that have to be made. The LSAT gets a great deal of unwarranted attention because it is only a part of a person's background.

- The LSAT is a statistical number. The problem that law schools have with LSAT numbers is the inability to get away from them. The LSAT is alluring because we live in a society that loves numbers.
- Law schools try to look at an applicant's file as holistically as possible.
- The LSAT score is indicative of success in law school at the margins.
- Schools' admission numbers of acceptance are set because the LSAT is one factor that everyone has in common.
- People at the high end of the number range get into law school, and people at the low end of the range do not get into law school.
- The LSAT score is indicative of the ability to succeed in the first year of law school.

Suggestion - There is a lack of knowledge in the minority community about applying to law school. Many minority communities do not know about the process of paying for law school and taking the LSAT.

- The legal community needs to get out to the elementary schools, high schools and undergraduate schools in minority neighborhoods to inform students about law school opportunities.
- The minority students are not given the opportunity to take LSAT prep classes. Many minority students do not have the funds to take LSAT prep courses. There needs to be funding of scholarships to allow minority students to take the prep courses.

Once in law school, what is being done to prepare minority students to pass the bar exam?

- IU - Indianapolis has a program called the Dean's Tutorial Society to provide academic support to students that are having trouble.
- Passing the bar exam is a huge issue for all law schools. The law school has a set of core courses that they recommend students take, but some students are afraid to take some of the classes because they may have a fear of getting a bad grade.
- Law professors need to have a commitment to working with students of color, women, or people with disabilities.
- Much recruiting of entry-level faculty occurs with individuals who do not have teaching experience. Recruitment of more experienced faculty looks very highly at the student evaluations from past institutions.

Panelist - Professor Vernellia Randall

- Law schools, in general, are not doing their job in educating Blacks, Hispanics or Native Americans.
- Law schools are denying admission to minorities that are academically qualified because they do not meet the school's "other" needs.
- LSAC (service that creates the LSAT) says if you take the LSAT test one time and get a 150, there is a 65% likelihood that it is a true representation of that person's ability.
- It is important that law school reflect the society.
- She believes this is an anti-discrimination problem, not a diversity problem.
- She puts out a web book called: academic.udayton.edu/TheWhitestLawSchools

- Students need to look at law schools based on representation of others like them.
- When schools draw a line for admission at certain LSAT scores, they are drawing a line that cannot be defended.

Improving Diversity in Legal Education

Saturday, October 15, 2005 from 10:00 a.m. - 11:30 a.m.

Panelists: Susanah Mead, Interim Dean for Indiana University School of Law - Indianapolis
John Applegate, Executive Associate Dean for Academic Affairs and Walter F. Foskett Professor of Law - Indiana University School of Law - Bloomington
Vernellia Randall - Professor of Law and Director of the Academic Excellence Program for University of Dayton Law School

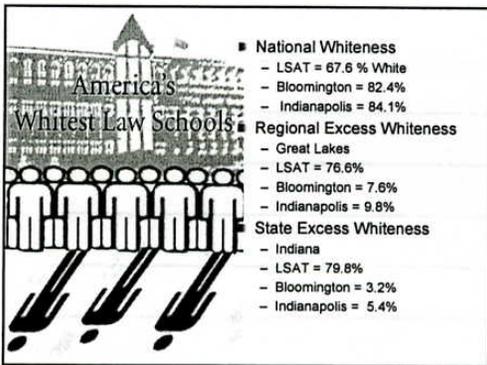
Moderators: Judge Ezra Friedlander, Indiana Court of Appeals for the Second District
Jana Matthews, Staff Attorney, Division of State Court Administration

Scrivener: Laura Rochet, J.D. Candidate 2007, Indiana University School of Law - Bloomington

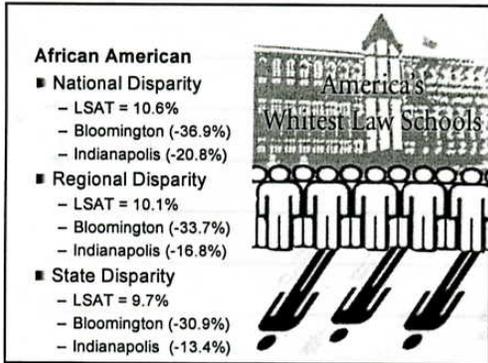
****Professor Vernellia Randall presented a power-point presentation during this session about law schools using LSAT scores as cutoffs for presumptive denials for admission to law school. That presentation is shown below; however, for a full explanation of the statistics she cites as well as the methodology she used, we would encourage you to visit the web address listing her report on this subject at: academic.udayton.edu/TheWhitestLawSchools*

LSAT, the Myth of Merit and the Death of the Black Lawyer

In proportion to application, there will be less black lawyers.



Although Indiana schools are fine on "whiteness," they are African Americans do not make up the diversity.



LSAT and the Myth of Merit

- Correlation studies between LSAT and first year law school grades
 - Statistically significant . . . "but they never come close to accounting for all the factors that contribute to . . . Performance" LSAC
 - Accounts for **16%** of variance in first year law school grades/ UGPA accounts for **10%**
- Score Band
 - Single Score of 150
 - 68% 147 to 153 7 pts
 - 95% 143 to 157 14 pts
 - 99% 140 to 160 21 pts
 - "... If students with these scores [144/145] the first time took the test a dozen more times, we have no idea which student would end up with the higher average score" LSAC

Considering the low statistical support for the LSAT, the LSAT cut off rates are ineffective for selecting students.

Why Inappropriate as Primary or Sole Factor

- Law School Admission Council
 - "the LSAT should be used only as one of several criteria for evaluation and should not be given undue weight solely because its use is convenient"

LSAT Accuracy as measure of limited skills is, at best, moderate

- Statistical probability of one score being a true measure of an applicant's skill.
- If applicant score 150
 - 68% probability (7 pt spread) (147 to 153)
 - 95% probability (14 pt spread) (143 to 157)
 - 99% probability (21 pt spread) (140 to 160)

Improving Academic Performance

- the use of a cut-off score should be related to a student's ability to successfully complete

■ As a factor in success

- LSAT account for 15%
- UGPA account for 10%
- 75% unaccounted for

| | |
|---------------------------|------|
| Perfect Correlation = 1.0 | |
| LSAT Only | .421 |
| UGPA Only | .222 |
| LSAT & UGPA | .470 |

Example Correlation Study
Reflective of a 4th Tier School

| LSAT | UGPA | | | | | | | | | | | |
|------|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|--|
| | 4.0 | 3.8 | 3.6 | 3.4 | 3.2 | 3.0 | 2.8 | 2.6 | 2.4 | 2.2 | 2.0 | |
| 145 | 2.5 | 2.5 | 2.4 | 2.4 | 2.3 | 2.3 | 2.2 | 2.2 | 2.1 | 2.1 | 2.0 | |
| 140 | 2.4 | 2.3 | 2.3 | 2.2 | 2.2 | 2.1 | 2.1 | 2.0 | 2.0 | 1.9 | 1.9 | |
| 135 | 2.0 | 1.9 | 1.9 | 1.8 | 1.8 | 1.7 | 1.7 | 1.6 | 1.6 | 1.5 | 1.5 | |

Increasing LSAT scores keeps the same law school GPA because of the grading curve.

Improving Bar Passage

- **First time bar passage rate versus Eventual Bar Passage rate**
 - 70-90% of all graduates pass the bar within 2-3 retakes.
 - Examinees of color who eventually passed, between 94 and 97 percent passed after one or two attempts and 99 percent passed by the third attempt
- Bar Passage disparity can be eliminated with appropriate 3rd year and post-graduation bar passage support activity

Bar Passage support
not admission
denial is the
answer.

Eventual Bar Passage

| | |
|--------------------|-------|
| American Indians | 82.8% |
| Asian Americans | 91.9% |
| African Americans | 77.6% |
| Mexican Americans | 88.4% |
| Puerto Rican | 79.7% |
| Hispanic | 89.0% |
| European Americans | 96.7% |

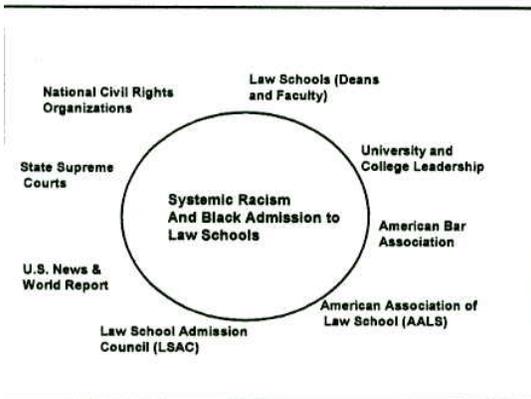
Improving Overall Quality and Ranking

- Not a legally acceptable reason for using a cut-off score that discriminates
 - See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) In *Griggs*, the Supreme Court rejected the position that since a policy requiring a high school education serves the business purpose of upgrading the general quality of the work force, such policy is justified despite its discriminatory impact against blacks.
- Ineffective method of increasing ranking: since LSAT scores only account for about 12% of a law school's ranking score in US NEWS

Decreasing Workload

- Should faculty limit access and opportunity for racial and ethnic minorities because we are unwilling to spend time to do our job?
- as long as we invite people to apply, shouldn't they all get the same careful consideration?

Systemic Racism and Law School Admission



Making Schools Accountable

- Demand that the school has a student body that reflects, at a minimum the racial diversity of the nation, generally and the racial diversity of the region specifically.
- Form a group to monitor your school; or your *alma mater*;
- Ally yourself with supportive members of the legal academy ; for references contact the Society of American Law Teachers .

Making Schools Accountable

- Protest the presumptive practice, in general, and specifically any presumptive cut-off not based on documented inability to perform well in the particular law school;
- Protest any admission practice that does not provide the same full file review to all the applicants. That review should be done by entire admission committee and not just one or two admission professionals.
-

Making School's Accountable

- Don't accept attempts to increase the number of black students without changes in presumptive deny policy and practice (decreasing opportunities).
- Collect data including your school's LSAC First Year Correlation Studies.

Making School's Accountable

- Support efforts to get the ABA and the AALS to change their accreditation requirements

- oppresses in pervasive, insidious ways
- Reduced Incomes
- Exclusion from politics
- Reduces services to community
- Maintain perception of unjust system
- Exclusion from judiciary
- Reduce Social Mobility

Race and the Law in the 21st Century

W.E.B. Dubois said that "the problem of the 20th century was the problem of the color line."

That color line was overt and legally enforced.

Here at the beginning of the 21st century, the problem of the color line continues - but now it is institutionally and structurally enforced. In the absence of laws, policies, practices and reparations that address institutional racism and discrimination, the problem of color line in the law will continue for another hundred years.

What's Diversity Got to Do With It?

Saturday, October 15, 2005 from 10:00 a.m. - 11:30 a.m.

- Panelists: Carl Cooper, Chief Diversity Officer, Kilpatrick & Lockhart Nicholson Graham
David Cade, Attorney, General Motors, Product Litigation Group
Kelvin Scott, General Counsel, Plastech, Inc.
Charlotte Westerhaus, Chief Diversity Officer, NCAA
- Moderator: Hon. Myra Selby, Former Indiana Supreme Court Justice and currently a Partner
at Ice Miller
- Scrivener: Shawtina Ferguson, J.D. Candidate 2008, University of Notre Dame Law School

Describe the business case for diversity in your setting.

- Diversity is a compelling state interest. Law firms jumping on the diversity bandwagon are realizing changes in demographics.

Question raised: Will it ever be safe to sunset affirmative action?

- Corporate sector is engine that can drive machine of diversity - "when numbers speak, courts listen -- when corporations speak, law firms listen" -- so demand diversity. Diversity challenges monolithic thought.
- Diversity challenges monolithic thought. Don't confuse affirmative action with diversity. Affirmative action is policy; diversity is appreciation of difference. Diversity allows policy makers to appreciate differences and reduce personal biases. Diversity should inform marketing strategies. Diversity allows people to correct misnomers and generates a more complete discussion that reflects a global community. Diversity must extend beyond race to include all marginalized groups. Diverse voices bring new approaches to problem solving. Tension is necessary in decision-making. Diversity brings tension. With privilege comes responsibility -- demand diversity!

How do we get from here to there? How do we achieve diversity goals?

- Establish power with colleagues from different firms/clients.
- Recognize responsibility to help develop younger attorneys of color.
- Target compensation - has to be driven from the top. Corporate leaders need to be on board. Get buy-in from top. Don't shift responsibility - everyone must take part in diversity hiring and retention.

In the wake of Hurricane Katrina and events like it, do those conversations about race and class affect the business setting?

- America has never come to terms with the race/slavery legacy. In order to get beyond race, we have to admit it is there. People talk about "it" but they are not getting "it." As a society, we deflect; we don't deal.

Is it meaningful when people respond "diversity isn't just about race"?

- Many advocacy groups for women did not submit amicus briefs in the *Miller-El* cases. They assumed courts only concerned with "them" (race) not "us" (women). Race divides women. Must be more solidarity among women! There needs to be a strategic, deliberate strategy for women of color and white women.

What's Diversity Got to Do With It?

Saturday, October 15, 2005 from 2:15 p.m. - 3:45 p.m.

- Panelists: Carl Cooper, Chief Diversity Officer, Kilpatrick & Lockhart Nicholson Graham
David Cade, Attorney, General Motors, Product Litigation Group
Kelvin Scott, General Counsel, Plastech, Inc.
- Moderator: Hon. Myra Selby, Former Indiana Supreme Court Justice and currently a Partner
at Ice Miller
- Scrivener: Jasmine Parson, J.D. Candidate 2008, Indiana University School of Law -
Indianapolis

What is the business case for diversity?

David Cade: Several components --

- Try not to use diversity and affirmative action as synonymous terms. Diversity is an appreciation of cultures and backgrounds. Business case for diversity goes into marketing: who is selling our products and who is purchasing? As attorneys, this is sensitivity to the audience to which you are bringing a case and presenting counsel. If you are in a place that has a high percentage of persons of color, make sure your counsel includes persons of color. Corporate America is recognizing that as the demographics of the nation change, marketing efforts have to be focused to take these differences into account.

Kelvin Scott: Be sensitive to the needs and desires of customers. Part of the business case for diversity encompasses mandates from [our] customers to have certain levels of minority employees and show use of minority vendors for transactions within the business. Be sensitive to who your audience is; that is smart business.

Carl Cooper: As a part of a national law firm, you want to have diversity in the professional and nonprofessional areas of the offices. Some business opportunities are not even available unless firms are involving themselves in diversity efforts; some clients are looking for this. No large firm today should be unwilling to present evidence of diversity, even at a surface level. While law firms seem to be committed to diversity on the basis of a business case, there is still the "revolving door" phenomenon; some people of color make it in at the associate level but do not make it to the partner level. Be aware of the fact that the business case can only take you so far; a more troubling aspect is retention. The real power lies in the upper ranks and executive committees of large law firms. The smaller the law firm, the less likely they are inclined to be the first. Most minorities go into solo practice or small law firms.

What do you do in the law firm setting to be sure that younger lawyers of color are getting opportunities that will allow them to move up and have a decent shot at partnership?

Carl Cooper: Several programs by local and national bar associations are worth note. The ABA Minority Counsel Program takes general counsel of Fortune 500 corporations together for two days for networking. General counsels are forced to meet with other general counsels and get an idea of what other general counsels are looking for and offer insight and suggestions about what your firm is doing. State bar associations have similar programs. All have varying degrees of success. Because the general counsels are so sought after, they almost have to "get to know you on the fly." There's a certain amount of induced relationships, but partners at law firms have to understand that you will not be able to get the "big fish." As a young associate, try to avoid being relegated to doing only the entry-level opportunities; get a range of different tasks and develop a range of skills and experiences. "Convergence" -- weeding hundreds of firms down to a select few; firms need to provide quality work, cost-efficient work that is being spread in a diverse way.

Kelvin Scott: The ABA Minority Counsel Program is an established program. There needs to be an association with that program and others like it; there needs to be another link to address retention and matriculation to partner for minority associates.

David Cade: The responsibility is on the partners of the firms; many in-house counsel understand the politics. [I] insist that the partners that work with me, look like me. Develop a relationship with the partners.

Audience question: In the "Diversity in Legal Education" session, there was discussion about the "Pipeline Problem," decreasing numbers and percentages of people of color coming into the pool from which law schools can accept students -- to what extent are your firms and companies addressing this problem?

Kelvin Scott: [My company] is not doing anything though we are trying to find ways to impact that. It is a complicated phenomenon. At what time do you start? At the high school level....teaching importance of grades and planning?

Carl Cooper: There's a pipeline program in Houston sponsored by the ABA. Using law schools as the point of contact for collaboration, stakeholders from K-12, undergraduate and community colleges forming modules to discuss "pipeline" programs starting at the grade school level. There is online registry of all "pipeline" programs in law existing in America - program identifies programs only, not validating. We will continue to monitor those programs and success rate to secure funding. Also bringing into this stakeholder's conference are different funding sources like Gates Foundation, Kellogg Foundation. I will be speaking at the National Youth Forum on Law program this week and will be working with the ABA to coordinate these programs and act as a clearinghouse for resources to new programs.

Audience question: Is there anything like that program in Indiana?

Hon. Selby: To her knowledge, not yet anything in Indiana. Because we are aware of the programs and the fact that the council cannot do it all, we need to push the programs out so that people can learn about them. There are programs and funding available and partnerships available with organizations with standing programs in which we could use models that are working in other places.

Audience member: There is a limited program with Prof. Kevin Brown. First-year law students are given internships at firms and at Eli Lilly - program will expand to Cummins.

Audience question: The issue of retention and small firms and how the diversity situation impacts these firms came up -- any recommendations that can help reverse this trend?

Kelvin Scott: Part of the case for smaller firms is who their jury pools will be. Entrepreneurs that are looking for legal representation might look to smaller firms.

Carl Cooper: A few bar association programs focus work on diversity in smaller firms. Their firms are asked to take a student on for a summer with no commitment required to hire that individual. Grades are not revealed to firms until after the summer. The grades should not be a deciding factor in whether a student gets a summer position. The good thing about programs like this is the involvement of local bar associations and the involvement of the schools. The only down side is that when these programs come in some firms have already hired their summer associates, so students were able to go work in a public interest arena at the rate they would have been paid as if they were in the larger firms.

David Cade: Program that places first-year students in firms so that grades are not a factor in the decisions. Students are paid the rate that the average summer associate will be paid. Employment offers have been made as a result of these programs. Diversity programs seem to be focused more at large cities. There is no one program that would be uniform across the country. This nation has not yet accepted that race and gender are still issues.

Audience question: What has happened to the moral case for diversity? What kind of networking opportunities can you recommend for associates, senior associates, and partners for developing business in firms?

Kelvin Scott: The best place to start is with a developed skill set. There is no substitute for doing a good job on the work you have to attract the attention of other businesses. Get involved with the bar associations. Seek out rising stars in corporate law departments. Get involved with young lawyers' groups in your area. Market yourself inside and outside of your firm. Develop relationships.

Carl Cooper: We do not pay enough attention to the fact that you can impress members of your firm and others in the community by doing pro bono and public service work. Partners are a lot less likely to look over your shoulder if you are doing pro bono work. There's an article in the Diversity Newsletter about the synergy at the intersection of pro bono and diversity. Many corporations are interested in the diversity programming and pro bono

work. Young lawyers should spend down time doing pro bono work or trying to write law review articles, etc. Do not wait for the opportunities to come to you. Identify a discrete area that you would like to develop an expertise in.

David Cade: Get involved in bar association activities. Young associates need to learn a skill set useful for generating business. You never know what opportunities might arise. Develop people-skills; develop relationships so that people like being around you, like talking to you, and want to do things for you.

How far are corporations willing to go to make sure that diversity is addressed in their business?

David Cade: Corporate America is very good about stating their intentions on being diverse; lawyers are, at best, risk adverse. The work has to be personal to the lawyers. "Make it public and make it brutal."

Carl Cooper: Businesses are willing to terminate firms that do not heed their call to action. Firms that ignore the business interest in diversity are at risk of losing their business.

The International Community's Access to the Courts

Saturday, October 15, 2005 from 2:15 p.m. – 3:45 p.m.

Panelists: Sergio Aguilera Beteta, Consul of Mexico, Indianapolis Office
Nissa Ricafort, Broyles Kight & Ricafort, LLP
Jose Salinas, Salinas Law Office PC
Rafael Ramirez, Ramirez Law Office PC

Moderators: Judge Lorenzo Arredondo, Lake Circuit Court
Rosy Meza de Nuttle, Law Office of Rosy Meza de Nuttle

Scrivener: Patricia Chen, J.D. Candidate 2007, Indiana University School of Law – Indianapolis
Carla De La Barra, J.D. Candidate 2008, Indiana University School of Law - Bloomington

Outline of Subjects:

Vienna Convention
Hague Convention
Villegas v. Silverman
Immigration Consequences of Guilty Pleas

The Vienna Convention and Case Law (Hon. Sergio Aguilera Beteta)

Even though the United States was established by immigrants and waves of immigrants have contributed to its growth, there are many individuals in the United States that are diversity-challenged. These individuals would prefer to live in the comfort of homogeneity than face the comforts of diversity. Diversity is now a hot topic in schools, institutions, and in society.

Talk of “diversity” often is kept at a simple level; “diversity” sometimes is confused with “representation.” We need to elevate the discussion to incorporate other aspects. Judges need to develop a higher level of awareness and sensitivity when dealing with immigrants and their culture.

We will focus on the “Hispanic” immigrant. We start the problem with precisely that classification which generally is “Hispanic” or “Latino,” denoting that we are all the same. Although there are over 30 Spanish-speaking countries and those countries have a range of skin tones and different languages, everyone is grouped into this “Latino” category. Although we have things in common such as religion and language, there are many differences. For instance, although we speak the same language, there are different meanings to the words.

STEREOTYPES

- Diversity creates a certain level of tension. If a person adopts a stereotype of another person, there is always tension and conflicts. Take language, for example. If a person who does not understand the language is detained and put in jail, this person may not understand the legal system or the law. He may not know the charge he is accused of committing and what are his legal rights. The most important principle of the legal system is to let an accused know and understand what is against him and why. It would

be too much to expect to have interpreters that can cover 50 languages, but it would be a great opportunity to have someone who could at least cover the Spanish population since it has grown so much in the last 50 years. Currently, the Hispanic population represents 1/7 of the total population in the United States, with approximately 1 million people categorized as Hispanic. Among that group, two-thirds are from Mexico.

- Since 9-11 in 2001, some individuals tend to correlate the immigrant status with “terrorist.” Immigrants are profiled and seen as potential terrorists, even when they are just coming to the United States to work. This causes problems as the majority of immigrants are residents or citizens in the United States with only a minority being illegal immigrants. While some immigrants may stay after their visas are expired or illegally entered the United States in the beginning, they are not terrorists. Given such facts, how can we extend this to mean that immigrants are a threat to national security?

PROBLEMS FOR IMMIGRANTS:

- Language barriers
- Lack of knowledge of the legal system
- Lack of compliance with immigrants’ legal rights (such as right to be in contact with the consulate – right afforded to immigrants under the Vienna convention)
- Lack of trust of the police (in many Latin-American countries, relations between civil society and the police are strained, leading to little trust by immigrants of the American police)

MEXICAN CONSULATE OFFICE PROVIDES:

- Passport or other identifications
- Birth Certificate
- Other certificates
- Protection and assistance to immigrants. Specifically, the consular office offers legal assistance to make sure that Mexican citizens are not discriminated against. The consular office also closely monitors law enforcement’s compliance with the Vienna Convention, which was ratified by Congress. The Vienna Convention regulates the law of consulates, both in the sending countries and in the receiving countries.

ARTICLE 36 OF THE VIENNA CONVENTION

Paragraph 1 provides that:

With view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and have access to them. Nationals of the sending State shall have the same freedom with respect to communicating with and access to consular officers of the sending State;
- (b) **if** he so requests, the competent authorities of the receiving State **shall, without delay**, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. ***Any communication addressed to the consular post by the person arrested, in prison, custody or***

detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular offices shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Synopsis:

- Consular is responsible for letting police enforcement know about the existence of Article 36 of the Vienna Convention.
- Nationals should be free to communicate with their consulates.
- Section (b) provides that if the consular requests, the competent authorities shall, without delay, inform the consular of any of the consulate's nationals within the district who have been arrested, committed to prison or are in custody pending trial.
- If a person is a Mexican national, he has the right to have advice from the consulate office. The request "I want to talk to my consular" is equivalent to "I want to talk to my lawyer." Police must stop interrogation immediately when a Mexican citizen makes the request. If police enforcement do not follow Article 36 and stop the interrogation to allow the Mexican citizen to speak with the consular, then the case can be thrown out.
- Article 36 and capital cases: Mexican authorities asked the International Court of Justice at the Hague Convention to deem 52 capital cases of Mexican nationals in the United States mistrials as the Mexican citizens had not been informed that they could get in touch with the consulate. In 2004, the International Court issued a decision that the death penalty proceedings on those 52 cases must be stopped. (*Case Concerning Avena and Other Mexican Nationals, Mexico v. United States of American*, 2004 I.C.J. 128 (2004)). The cases currently are under review with new information and evidence regarding the cases.¹
- The *Avena* decision is a landmark case as the International Court of Justice recognized that members of the Vienna Convention have the obligation to advise foreign nationals in the receiving State whenever they are charged with committing crimes. This often is not done. Currently, the consular has sent hundreds of letters to police departments letting them know that the Mexican Consulate is in Indianapolis, listing ways to contact the office, and even simplifying forms so that police departments merely need to fill in the date, crime and name and then send it back to the office. All police officers need to understand is that this procedure (notifying the consulate) must be done. Lawyers and courts also must be involved to ensure that Article 36 is followed.

¹ See also <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#background>. The World Court ruled that U.S. courts should give the death row inmates "meaningful review" of their convictions and sentences. The case is *Medellin v. Dretke*, No. 04-5928. (Associated Press, December 10, 2004).

AUDIENCE RESPONSE

- Judge Arredondo of Lake Circuit Court and member of the Commission on Race and Gender Fairness pointed out that the Indiana Supreme Court instituted a Court Interpreter Certification Program to assist on the issue of language barriers. Currently, there are 18 certified interpreters in the State. In addition, the Commission on Race and Gender Fairness also has made available to the courts pre-recorded videos and DVDs in Spanish notifying accused individuals of their Miranda warnings and other constitutional protections as well as possible penalties the individual may face if convicted. Approximately 250 of these videos and DVDs were distributed at the Indiana Judicial Conference in September 2005.
- Mexican Consulate Office also has printed cards to distribute to Mexican nationals, informing them of their rights under Article 36. In Spanish, the card reads “if you are a foreign national, you have the right to contact your embassy.”
- A certified interpreter in the audience indicated that when she asks an individual whether he has been informed of his *Miranda* rights, the answer usually is “no.” Sometimes the police respond that the accused has the card from the consular, so the police don’t feel that they need to read him the rights since the individual already knows his rights.
- Steps are being taken against officers who are not giving out the Article 36 cards. It is important to have some written material in order to have the right protected. The problems for many immigrants arise due to ignorance of the law. The Mexican Consulate is trying to bring better access to communities that traditionally have had limited access because this lack of access is the essence of the problem.

Hague Convention and International Custody Disputes (Nissa Ricafort)

Nissa Ricafort’s practice at Broyles Kight & Ricafort primarily focuses on family and immigration issues. As more immigrants come to the Midwest, the area has more international marriages. When these relationships are dissolved, international custody disputes become serious issues. For example, a foreign national marries a U.S. citizen and has a child during the marriage. Later the marriage does not work out, and the foreign national takes the child and leaves the country.

HAGUE CONVENTION:

The Hague Convention is an international treaty that has been signed by numerous countries and has been implemented in the U.S. by the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. § 11601 et seq. The Hague Convention is a mechanism to return children back to their home countries, but it does not resolve custody disputes. It just resolves whether the child should be returned to his/her country of origin. Specifically, the Hague Convention applies when there has been a “wrongful removal or retention” of a child abroad, and the child was taken from a parent who was properly “exercising custody rights.” The Hague Convention requires courts of the country where the child is located to immediately return the child to the country of the child’s habitual residence. For any

individuals involved in an international custody dispute, they should first find out if the country where the child has been taken to has signed the Hague Convention.

- Defending the Return of a Child: Client was Hungarian. When a client and the children have to move, there is website or a number to call. In the U.S., the central authority is the U.S. Department of Justice, which has delegated this duty to the National Center for Missing and Exploited Children (“NCMEC”). The contact information for the NCMEC is www.missingkids.com. Any person that files with the NCMEC, even if not a citizen, has the right to an attorney. Proceedings can be initiated even without a custody order.
 - A custody order is not required when it is an international dispute so long as the parent has the established rights. However, it is very helpful if the client does have a court’s custody order. As long as a parent is exercising custodial rights, then no violation of the Hague Convention has occurred.
- Filing: Cases can be filed in federal or state court; however, federal court usually does not have much time to work on these types of cases. The state courts often are better venues as they hear family law cases on a regular basis and are better equipped to deal with the basics of the issues. On the other hand, a client has the U.S. Marshal available if case is filed in the federal court, and they often are more helpful when trying to find someone.
- Burden of Proof: The parent requesting the return of the child has the burden of proving by the preponderance of the evidence that the requirements for the return of the child have been met. Once petitioning parent meets his or her burden, the court must order the return of the child unless the responding parent proves one of the affirmative defenses by clear and convincing evidence. *See* 42 U.S.C. § 11603 (e)(2)(A)(b).
- Affirmative Defenses to the Hague Convention:
 - Custodial parent was not exercising custodial rights by his or her choice.
 - There is a grave risk of physical and psychological harm to the child if the child is returned to his or her home country, or the child would otherwise be placed in an intolerable situation in his or her country of habitual residence.
 - The child objects to being returned and has reached an age and degree of maturity at which the court would take account of the child’s view.
 - The return of the child would violate the fundamental principles of human rights and freedoms of the country where the child is being held.
 - The application for return of the child is made more than 1 year after the child was removed or wrongfully retained and the child has become settled in his or her new country.
- What can a parent do to prevent an international custody dispute?
 - Ask for a temporary restraining order.
 - Apply for a petition to have the other parent, who might take the child, surrender his or her passport to the court.

- Register the other parent's passport on the federal watch list (Passport Watch Program). Then, the custodial parent will be notified if the other parent wants to apply for a new passport for the child. However, once a passport is issued, there is no way to trace it.
 - Hon. Sergio Aguilera – the Mexican Consulate never issues a passport to an individual unless both parents are there to sign the document.

Villegas v. Silverman: Immigrants and the BMV (Rafael Ramirez)

Rafael Ramirez of Ramirez Law Office, P.C. was one of the attorneys involved in suing the BMV since the bureau developed a policy of no longer issuing licenses to immigrants unless they can prove their legal status. As an attorney involved in the case, Ramirez put information about Article 36 of the Vienna Convention in the brief. However, the Indiana Court of Appeals ruled that the BMV's new identification requirements constituted a "rule" and thus BMV was required to comply with the rulemaking procedures set forth in the state's Administrative Rules and Procedures Act (ARPA).

Zavala v. State, 739 N.E.2d 135 (Ind. Ct. App. 2000) - addressed issue of whether a criminal conviction should be vacated when a police officer violated the Vienna Convention by failing to advise a Mexican national of his right to contact the Mexican Consul. Appellant argued that his conviction should be overturned. The Indiana Court of Appeals disagreed, reasoning that the Vienna Convention is facially ambiguous on the subject of whether the treaty creates individual rights to enforce violations of the treaty and fails to address whether those individual rights would justify suppression of evidence or dismissal of an indictment. Assuming without deciding that an individual would have standing under the treaty, the Court ruled that Zavala could not demonstrate actual prejudice from the alleged violation. In so finding, the Court applied the following test: to establish prejudice, a defendant must show that: 1) he did not know of his right to contact the consulate for assistance, 2) he would have availed himself of the right had he known of it, and 3) there was a likelihood that the consulate would have assisted the defendant.

E.R., C.R., N.R., J.R. and J.O.R. v. Marion County Office of Family & Children, 729 N.E.2d 1052 (Ind. Ct. App. 2000) – the county office of family and children instituted CHINS proceedings with respect to five children of Mexican nationals. The juvenile court judge determined all 5 children to be CHINS and subsequently continued the children's foster care placements. The parents filed an interlocutory appeal, arguing that Article 36 and 37 of the Vienna Convention affords certain rights to Mexican national parents of children who are subject to CHINS proceedings. The Indiana Court of Appeals ruled that the Consulate of Mexico had sufficient notice of county's removal of children to satisfy the Vienna Convention even though no state official formally notified Consulate. Because the father had filed a formal request with the Consulate seeking intervention of the Mexican government, sufficient notice had been provided. Further, the parents could show no resulting prejudice due to violation of the notice requirement. The Court also ruled that failure to place the children in Hispanic or Spanish-speaking foster homes was not contrary to the children's best interests when county and juvenile courts had made efforts to recruit Hispanic and Spanish-speaking foster parents with little success, the children had been placed in homes well-suited to their needs and provided with Spanish-speaking caseworkers and counselors, and the possibility that the children could be placed with relatives in Mexico in the future had not been foreclosed.

Stolen Identities and Social Security Numbers

- When you ask many Americans who is using the fake ID and SSN, the answer most of the time will be Latinos, but the fact is that it is the con man who uses this same method. After 9-11, the bull's eye of blame fell on the Latino community.
- Social Security Act makes it unlawful to disclose an individual's social security number. Indiana has a social security validation tool that the Social Security office can print out from the computer. Now, this tool is being used to prosecute those immigrants.
- Strategies in Response (when immigrant is arrested for using fake social security #)
 - File a suppression motion for violation of Article 36
 - Use racial profiling as a defense but be aware that it is very expensive and difficult to obtain the evidence. Usually, a client cannot afford it. Under the PATRIOT Act, it is very difficult for an attorney to work on this type of case.
 - When the government tries to protect the citizens, it takes away the citizens' liberty. We see the necessity to be protected. It is understandable. We believe we need protection. However, without challenging the legality of all of the methods, the government will just take away most of your rights.

Response by Hon. Sergio Aguilera Beteta: This also relates to the issue regarding an individual's ignorance of the law. The federal authority has recognized Article 36 of the Vienna Convention and the individual's rights, but a state has its own autonomy (at least some authority). The court or judges can look at this issue and say that we need to respect and recognize to improve the justice in the state. Cases have shown that the international law is the law of the land and we need to respect that. The *Zavala* case found that the police had a duty to inform but the defendant cannot get away from punishment. Article 36 is to ensure due process when a defendant encounters difficulties that he should be informed and protected by the law; Article 36 is not intended to get a person off the hook.

Response by Jose Salinas: Right to speak to the consulate is on the same level as the right to have an attorney. It should not afford any more protection. You know that if they (the police) are going to interrogate somebody, it is important to have the consulate there to have the immigrant's rights protected. However, what should be seen (in a suppression motion) is whether he understood that he had his *Miranda* rights. The basis of Article 36 was to give people rights when there is no counsel.

Immigration Consequences of Guilty Pleas (Jose Salinas)

- Information cards from the consular offices printed with legal rights appears to be progress. Moreover, there are certified interpreters to inform a defendant of his *Miranda* rights. The only negative consequence is that for defense attorneys, they cannot challenge that immigrants have not been given their rights and will not be able to challenge evidence obtained.

- What if an immigrant was informed of his legal rights but he did not understand the meaning of the *Miranda* warnings? The Vienna Convention recognizes the consulate's responsibility to assist the defendant for his defense. If the defendant was charged with a Class B felony without making sure that the defendant understood his rights and consequences, then the courts and legal system are falling far behind.
- According to immigration law, if the crime is an A, B or C felony, then more likely than not it will be a deportable offense. As a defense attorney, you should make sure your client will not get more jail time and will get out of jail as soon as possible in the hopes that it will not hit the INS radar. It will often be in your client's best interest to settle the case so that you can keep INS out of the situation as long as possible. However, prosecutors usually inform INS when a felony has been charged.

Juvenile Ethnic Gangs

Saturday, October 15, 2005 from 2:15 p.m. – 3:45 p.m.

Panelists: Olgen Williams, Executive Director of Christamore House
Capt. David Allender, Indianapolis Police Department
Byron Alston, Executive Director of Save the Youth Foundation

Moderators: Adrienne Meiring, Staff Attorney, Division of State Court Administration

Scrivener: Stephanie Jean-Jacques, J.D. Candidate 2008, University of Notre Dame Law School
Morgan Rogers, J.D. Candidate 2008, Indiana University School of Law - Bloomington

History of Gangs

- First known gang developed in India as supporters of the goddess Callie were referred to as "thuggies" ... it is how the word "thug" became known in the English language.
- Early white gangs - developed as early as 1820 in the Five Points District - referred to themselves as the 40 Thieves. As Irish immigrants came to NYC, they formed a subset called the "40 Little Thieves"
 - Often when immigrant groups come into new area, facing isolation, youths band together to form gangs . . . this is nothing new in our history.
- Early Hispanic gangs - developed in the 1920s and 1930s as there was a large immigrant influx in California.
- African-American gangs - In the 1920s, some African-American gangs developed but gang involvement dropped in the 1960s with the Civil Rights Movement.

Gangs Today

- Indiana gang problem - Indiana's biggest problem is with gangs coming from Chicago, they can drive here. Another developing problems is with suburban gangs - this is the fastest growing segment of gangs right now. Suburban gangs are more loosely knit than anything previously dealt with and are nontraditional. Suburban gangs are formed for a variety of reasons -- excitement, drug trafficking, etc. These gangs are often racially mixed and sometimes gender mixed. The structure of a gang is formed by the resources available. Information sources tend to be word of mouth, music, media, etc. The biggest problem gang in Indianapolis is 2-1 Fatal, an all-adult white gang. There has been a rise in Hispanic gangs in Indianapolis, but there's probably only 10-15 real gangsters in town; the problem is that if individuals think that they are real gangsters, then they kind of are (in terms of how dangerous they are).
- Gang member profile - many gang members come from households where one or more of the following has occurred:

- Divorce
 - Separation of parents
 - Physical abuse
 - Sexual abuse
 - One or more of the parents suffers from alcohol and/or drug abuse
- Reasons gangs exist - It's important to remember that most of what gangs do is *not* illegal
 - Structure - most gang members want some sort of structure in their lives
 - Nurturing - most gang members want someone to take care of them (care about them)
 - Economic opportunity - ex. drug dealing
 - Excitement - this is particularly true for why juveniles in the suburbs join gangs
 - Sense of belonging
 - Missing protector factor

How do we deal with the gang problem - recommendations?

- Currently, there is no mechanism in the FBI Uniform Crime Reports to record gang crimes. It is viewed as argumentative by various police agencies. Without accurate reporting of the situation, the problem gets ignored.
- Gangs are becoming more diverse, so we in the community need to be just as diverse when addressing the issue of gangs. Also, we need to establish mentoring programs for young women (as well as young men) since young women are being actively recruited these days into gangs.
- The most important thing is to give kids alternatives - more support for the proactive programs to help engage young people; get them involved in programs. Kids need to be told the other story of the gangster rather than just be left with the Hollywood glamorized version.
- Community policing is a very effective means of addressing growing gang problems as officers can learn where are the greatest problems in the community.
- Need to develop programs that tell kids how to break the cycle so they can get out of gangs.
- Need more proactive measures from juvenile court. Judges need to be aware when a juvenile comes into the courtroom and shows "disrespect" by wearing colors or other gang attire that the individual is not going to listen to anything said. Juvenile court also needs to look at alternatives to boys' school as some marginal youths succumb to gang activity just to survive.
- Need to hold parents, as well as children, liable. Parents need to be aware that they will be held accountable for their children and their involvement in the criminal justice system. Make parents part of the juvenile's sentence so that neglectful parents (for juveniles entering the system) must attend counseling sessions or parenting skills classes. Parental involvement is an essential component of gang prevention.

- At the education level, institute mandatory school uniforms so that gang "colors" and identifiers cannot be displayed. Also, there has to a commitment from respected leaders in the community to help kids develop positive role models.

Urban vs. Rural Sentencing: Diversity, Inequity or Reality

Saturday, October 15, 2005 from 2:15 p.m. – 3:45 p.m.

- Panelists: Judge Sheila Moss, Lake Superior Court
Judge David Shaheed, Marion Superior Court
Magistrate Norris Wang, Tippecanoe Superior Court
Judge Jane Craney, Morgan Superior Court
- Moderator: Judge Jane Craney, Morgan Superior Court
- Scrivener: Shalonda Guy, J.D. Candidate 2008, Indiana University School of Law - Bloomington
- Objective: Discuss whether there is a difference between urban and rural sentencing as determined by responses from judges representing small, medium, and large counties throughout the State of Indiana. (Lake and Marion counties represent large counties; Tippecanoe county represents a medium county and Morgan county represents a smaller county.)
- Scenario 1:* *Joe Citizen pleads guilty to Operating a Motor Vehicle While Intoxicated as a Class C misdemeanor. His B.A.C. was .11; he is 45 years old, married with two teenage children, and is employed full-time. He has no prior criminal arrests or convictions. How do you sentence?*
- Judge Moss: In Lake County, he would probably plead guilty if he has no public defender. If he pleads guilty of OVWI, then he would get 60 days suspended and/or 6 months probation. He would do 10-15 hours of community service and have his license suspended.
- Judge Shaheed: In Marion County, he would get 60 days license suspension, be required to attend a victim impact panel. He will not serve time in jail.
- Mag. Wang: In Tippecanoe County, if he is convicted on a guilty plea, then he will receive 1 year probation, \$100 probation fee, 3-week program of community service (will get certificate if he completes program), must attend victim impact panel, must complete 40 hours community service or 10 days in jail with good time credit, cannot consume alcohol or enter bar or tavern, and will receive a license suspension.
- Judge Craney: If he pleads guilty, then he will receive 3 days in jail (jail space is not a problem in Morgan County jails), \$100 fine, 60 day license suspension, mandatory probation, and must attend victim impact panel.

Scenario 2: Suzie Q. Normal pleads guilty to Possession of Marijuana under 30 grams as a Class A misdemeanor. She is 19 years old, a full-time college student earning B+ grades and hopes to attend law school one day. She has one prior incident involving marijuana as a juvenile, which was handled informally with no violation. How do you sentence?

Mag. Wang: Conditional discharge agreement in which defendant is on unsupervised probation for 1 year, undergoes court services evaluation, and completes 40 hours community service.

- Large amount of possession of marijuana cases. Meth is the second highest drug seen in drug cases in Tippecanoe County.
- Judge screens cases to determine which cases will go to diversion court.

Judge Shaheed: Defendant would not get drug treatment court/diversion program. Drug and alcohol abuse considered a disease.

Diversion programs available in Marion County:

- 1) PL 340 – conditional discharge
 - Community service
 - Must complete compliance in 4-5 months then case dismissed
 - No probation
- 2) Prosecution diversion program
 - Same requirements as in 1)
 - Marijuana diversion program
 - In drug court, no alcohol cases are seen – just drugs

Judge Moss: Lake County does not have conditional discharge unless for possession of marijuana. There would be no fine or cost. There is also LATOS – a court-run drug and alcohol abuse program. Length of the program varies across Lake County.

Judge Craney: Defendant would receive conditional discharge. If possible, defendant would undergo drug screens and if she received positive screen, then 1 year in jail. Ninety percent of criminal cases in Morgan County involve drugs and alcohol.

Additional question to Scenario 2: Did it make a difference that she was going to attend law school?

Judge Moss: Yes, the judge would talk to her after and before court to let her know the impact her actions will have on her future.

Scenario 3: Andy Andrews owned and was driving a vehicle pulled over by the police for a traffic violation. A record check of both Andrews and her front seat passenger, Ben Butthead, revealed a writ of attachment on both for failure to appear in separate civil cases. Both were arrested; the vehicle was inventoried prior to towing, and 2.5 grams of powder cocaine was found in the front seat console between the seats. Andrews denied the cocaine was his but was convicted by a

jury. Andrews has one adjudication as a juvenile for possession of marijuana and one prior OVWI as an adult. He is currently unemployed and has no dependents. How do you sentence?

- Judge Shaheed: Most lawyers practicing in Marion County would try to get defendant into drug treatment court. Defendant would get 365 days on probation with substance abuse evaluation. If a defendant wants to go to drug program, then he or she has to elect to go before the court. Defense counsel would have to make decision to go to drug treatment court (must determine how dedicated person is to getting treatment as nature of that court is that they only want to send the people to drug treatment who really want to go). Most defense attorneys would file a motion to suppress with this scenario.
- Mag. Wang: This case would go to drug treatment court (people have to volunteer to go to drug treatment court and cannot be reluctant to go). If person didn't go to drug treatment court, then after receiving a guilty plea, defendant would be subject to random drug screens. Defendant would get 30 days of community corrections program; 6 months house arrest.
- Judge Craney: Defendant would get 6 months in jail with 180 days to serve (good time credit for the rest) and would not be entitled to house arrest.
- Scenario 4:* *Same facts as Scenario 3 but the drug found was crack cocaine. Would your sentence be any different? What if the drug were methamphetamine?*
- Judge Craney: In Pike County, 90% of criminal cases are Meth cases.
- Judge Moss: No difference in Lake County if crack or powder cocaine. There is no drug court in Lake County; however, the City of Gary has a drug court. With prior OVWI, there would be 6 months community corrections, random urine testing at the beginning of the community corrections sentence, \$500 fine, and driver's license suspension.
- Add'l Question:* *If someone went to jury trial without a reason, would you "fine" the party? (rent on the courthouse, so to speak)*
- Judge Shaheed: No.
- Judge Craney: You have to fight the urge to "charge" as it is preferable in that situation for individual to plead guilty.
- Judge Moss: It is very rare for a person not to be able to get out on bail in this situation.
- Question:* *Why is there a difference between rural vs. urban sentencing?*
- Judge Craney: The judge has time to treat each case individually, so the judgments are more

severe. There is also plenty of room in jail, so people normally spend some time in jail.

Judge Shaheed: OVWI in Marion County receives no jail time (generally). There just isn't enough room in Marion County Jail to make an example of individuals convicted of OVWI. However, in Johnson County, a person convicted of OVWI likely will get jail time. They have no problem making an example of someone out there.

Scenario 5: Jane Pothead is convicted by a jury for Dealing in Methamphetamine as a Class B felony. She has a husband and 2 children that she left a year prior to her arrest, has no obvious means of supporting herself, one dismissal of possession of methamphetamine pursuant to a plea agreement, and was just recently arrested for Prostitution. At the time of her arrest, she was significantly underweight; her complexion had a gray appearance; she had red splotches all over her body; and, her teeth are extremely rotten and beginning to fall out. At the time of sentencing, Jane has obviously gained some weight and her complexion is normal. How do you sentence?

Judge Moss: She has had no meth cases in 13 years on the bench (so she deferred to Judge Murray, another judge in the audience from Lake County – he responded, sentence to a presumptive B felony sentence)

Judge Shaheed: There are very few cases like this that he has ever seen.

Mag. Wang: Defendant would not get drug court. She would receive a presumptive sentence and would be getting DOC time.

Judge Craney: Success rate is very low for meth offenders. She will not be able to bond out in Morgan County.

Other Judges' Responses: There is a gender bias in situations like Scenario 5. Other questions that will be considered in this scenario:

- Whether offender is male or female?
- Who is in control and who is a "pawn"?
- Are there children?
- Does parent(s) have other prior convictions?
- Are there other family members who can care for the children?
- Jail space for males/females? (typically, there is more space for males, so males will get jail time)

What about treatment groups?

Treatment groups and gender bias: there should be separate groups for each gender for drug treatment. Women tend to do worse in drug treatment if the group is co-ed.

What about pregnant defendants?

Judge Craney: She would do everything possible to keep a pregnant defendant in jail until birth of the child if there is evidence that the mother is still using drugs.

Judge Moss: Misdemeanor only place for female offenders.

Judge Shaheed: He will give a warning to a pregnant defendant first, then will keep the defendant in jail.

Bottom Line:

- There is not a bias; the differences in sentencing are a reality due to other factors. (There is a difference in resources which causes different sentencing in the different areas)
- There are really two types of sentencing: Mandatory and Discretionary.

Judge Moss: prefers discretionary sentencing

Judge Craney: would like to have a drug court

Social Consciousness and Sexual Orientation

Saturday, October 15, 2005 from 2:15 p.m. – 3:45 p.m.

- Panelists: Susan Hazer, Treasurer of the Indianapolis chapter of Parents and Friends of Lesbians and Gays (PFLAG)
Kathleen Sweeney, Attorney, Marion County Public Defender's Agency
Sean Lemieux, Attorney and former Director of the Project for Equal Rights at the Indiana Civil Liberties Union
Renee Faught, Regional Legal Senior Staff Attorney for American Family Insurance
Bree Anna Hartlage, Officer for Indiana Transgender Rights Advocacy Alliance
Shannon Price Minter, Legal Director for National Center for Lesbian Rights
- Moderator: Candace Sage, Attorney, Bingham McHale LLP
- Scrivener: Andrea Button, J.D. Candidate 2007, Indiana University School of Law - Bloomington
Chai Ri Park, J.D. Candidate 2008, University of Notre Dame Law School
- Objective: Six panelists associated with GLBT (gay, lesbian, bisexual, transgender) community spoke about their experiences in the legal system and beyond in the state of Indiana regarding these issues. The purpose of this session was to inform attendants of the current situations and attitudes of people regarding GLBT issues and to create an awareness of the importance of treating GLBT people with dignity and respect in both the community and the legal system.

Susan Hazer -- Parents and Friends of Lesbians and Gays

Susan Hazer experienced a drastic life change on March 17, 2005 at 5:00 p.m. when her daughter came out to her. This announcement came to her as a great surprise. Her daughter was very successful by outward measures - as valedictorian, a softball player, and a Wells Scholar. However, her daughter hadn't really been happy. The world told her daughter that a basic part of her was wrong and bad.

Upon finding out, Susan Hazer and her husband became worried about their daughter's acceptance and safety in society, so they joined PFLAG - Parents and Friends of Lesbians and Gays.

- PFLAG is an organization dedicated to family values: support, education and advocacy
 - Support - works to keep families together, fighting against the concept of abandoning "out" children, especially in the name of religion.
 - Indy PFLAG works with the Indianapolis Youth Group (IYG) and Youth and Diversity (YAD)
 - Promotes education about homosexuality
 - Advocacy - "all I want to do is change the world"
 - Recently held a state conference to promote advocacy
 - Against the marriage amendment
 - Their slogan "We value equality and love our families too."

- Many members are parents whose kids are GLBT
- Want them to be happy, loved, safe and have equal opportunities
- PFLAG now has 200,000 members with 500 chapters. In 1988, PFLAG only had 12 chapters. That represents a huge growth in 17 years.
- According to Susan Hazer, "It makes me literally sick to my stomach to hear leaders say that [GLBT] daughters and sons are threats to society." Three to ten percent of the population at large in U.S. in GLBT. There are 10,219 same-sex couples in Indiana, and they have loving families. They know they aren't a threat.
- Susan Hazer is glad her daughter came out as a lesbian because her daughter is happier.

Kathleen Sweeney -- Marion County Public Defender's Agency

Kathleen Sweeney has practiced law since 1984. She currently works as the training coordinator for the Marion County Public Defender's Agency where there are 150 attorneys.

As a lesbian, she has seen biases, but most people see no difference.

However, throughout her career, working in both state and federal courts in Indiana, she has witnessed bias in the legal system:

- One judge specifically stated that, "alcoholism is a sign of latent homosexuality."
- One judge will continue all cases if the judge knows that someone involved in them is gay. For this judge (and others too), stereotypical gays will absolutely get jail time, e.g. if a straight man gets caught for indecent exposure, he will be offered the diversion program. Gays, on the other hand, don't have this opportunity at large.
- System tends to treat bias as a benign condition - It is not. Individuals that are openly gay will never be slated for judge. Many people still consider this an issue of morality.
- Judges sometimes make prejudiced comments behind people's backs about gay people.
- Often in jail, officers will withhold medication from GLBT people as a means of harassment. The judge may send an order to administer the meds but that doesn't mean that it will be done. This happens often with transgender people.
- The issue is somewhat generational as younger lawyers tend to be more accepting. But how long do we have to suffer for proposed legislation to be enacted?

Sean Lemieux - Project for Equal Rights and Indiana Youth Group

Sean Lemieux wears different hats as he has a background in civil rights issues, having worked for the Project for Equal Rights at the Indiana Civil Liberties Union. Now, he is working with the Indiana Youth Group (IYG).

Indiana Youth Group (IYG) is a youth group for self-identified GLBT kids between the ages of 12 and 20. Most of the kids who attend are between 14 and 18 years of age.

- On average, the group has 300 kids per month come for help and/or support.
- Some kids drive for hours to get there.

- The program has counselors and referrals and provides education and programs on HIV prevention, smoking cessation, drug programs and help with resume writing
- Youth that come to the group come from all backgrounds. Some youth come from intact families; others do not. IYG has a program for homeless youth as well.
- IYG also has legal counsel for youth.
- The kids that come to IYG have two main concerns: 1) They want to be treated like everyone else, and 2) When it comes to the criminal justice system, homosexuality compounds their problems - it is very hard to get their voice heard as "not only a youth, but a gay youth."

Renee Faught - American Family Insurance Group

Renee Faught, a lesbian, is regional in-house counsel for American Family Insurance Group. Being Jewish, she also represents a racial/ethnic group as well.

Renee Faught characterizes her defining moment when she spent her first year as a law student in the closet, sorting how it would work for her if she were to come out. She did and by her second year in the profession, she was president of the Gay and Lesbian Law Society. When she sent out resumes for employment, she wanted to work for a place where she knew she could be authentic, so she prominently displayed her affiliation to her school's lesbian organization. She found that she didn't have any trouble finding employment (particularly for positions in civil rights litigation)

Renee Faught worked in Madison, WI for a while. Madison has an ordinance that requires new companies to protect same-sex families. She would love to see Indianapolis pass a similar ordinance.

In the courtroom, people don't know who she is personally (and they don't need to), but every day is a daily coming out. Every time she faces a judge, they see who she is, see her hairdo, etc. She doesn't feel that it is necessary to voice her personal self in the courtroom. As an open lesbian, it is much more difficult for her to express the personal side.

- For example, four years out of law school she was in front of a judge and her opposing counsel introduced himself as "a married man with children." She didn't feel that she could easily introduce herself in the same manner. "Hi, I'm a gay Jew" just wouldn't have the same effect.
- Her personal life is not what she is there for when in court.

On living life as an openly gay individual, Renee comments that you can make a decision in your life that you are going to be who you are and you don't need to hide that. Honesty should not be an impediment to your life, rights, etc.

Bree Anna Hartlage - Indiana Transgender Rights Advocacy Alliance (INTRAA)

Bree Anna Hartlage is a transgender female. She transitioned from male to female while serving active duty at a Navy base in Indiana and finishing her college degree.

Bree Hartlage is the treasurer for Indiana Transgender Rights Advocacy Alliance (INTRAA). This organization focuses on promoting acceptance of gender expression and congruence in order to bring advocacy, education and to promote awareness.

- INTRAA uses speakers' bureaus as a tool. Members speak at a lot of human sexuality courses at universities. Younger people tend to be more open to the concept. Students often want to ask a transgender person "who do you like?" The point is that gender identity and sexual orientation are two separate issues.
- INTRAA works with many human rights coalitions such as the Indiana Equality Coalition (IEC). The IEC also is committed to the idea of not mixing the concepts of gender identity and sexual orientation.

Bree Hartlage has spoken on several panels, talking to over 2,000 people in the last two years. However, she has experienced a difficult time getting government officials to discuss their policies on gender. The main question being: are you a man or women in the eyes of the law? Indiana doesn't include gender identity or sexual orientation in most nondiscrimination policies. This needs to be changed, at least at the local level.

Shannon Price Minter - National Center for Lesbian Rights

Shannon Price Minter represents transgender people. He's transgendered (female to male). He maintains that that Universal Declaration of Human Rights has to include EVERY person. Court systems need to treat all people with dignity. There is a lot of unequal treatment to people in the system; however, he concedes that the unequal treatment that transgender people receive is largely due to stereotypes and ignorance and that the mistreatment may not be malicious in origin.

Issues for transgender individuals in the legal system:

- Privacy - sometimes privacy issues concerning an individual's transgendered status will be brought up and discussed at length in courts even though that status is completely irrelevant to the matter at hand. Example - case involving an illegal strip search, arrest and derogatory remarks made to a transgender woman. Her attorneys had to fight to keep her transgender medical records out of the case. Had those records been a part of the case before a jury, it would have likely skewed the process.
- Court proceedings for name/gender change - It's difficult and scary for even the most seasoned attorney to go into court that one day to get that name (and gender) changed legally.
 - Even in San Francisco, it can be a scary process in the court system as people are unfamiliar and uncomfortable
 - This court proceeding should be a happy occasion (and many times is). It really means a lot for the transgender individual to be personally acknowledged or congratulated by the court.
- Using the correct name and pronoun in any case involving a transgender individual - It's important for judges and court staff to remember to use correct gender, name and pronouns even if the individual's gender itself is the contested issue in the case. Judge should make it clear that the name/pronoun use is out of respect for the party, not a legal judgment.
- Making sure that stereotypes don't influence outcome of disputes - i.e. custody cases.

- Criminal cases - this is the area where bias against the transgender individual is most painfully apparent, and this is the area where such bias is most dangerous to the transgender individual.
 - Transgender people are housed by their birth sex. It is extremely dangerous and leads to a lot of violence against transgender women in male prisons.
 - Diversion programs need to be readily available for transgender persons.
 - The consequences are so severe in criminal cases that the transgender status needs to be kept private.
 - Transgender people often are subjected to harassment while awaiting trial.

The Transgender Law Center offers free training for courtroom personnel.

Audience Questions

Is the disclosure of transgender medical records in the legal process ever a violation of HIPAA?

Bree Hartlage: In order to get a new driver's license in Indiana, a transgender individual is required to get a letter from his/her surgeon. That letter becomes part of the public record. In Indiana, there's no written policy on what to do on obtaining a new license when gender has been changed. The unwritten policy could easily change from day to day.

Audience response: Courts are required to seal certain private HIPAA-covered records. They've been published on green sheets only since last year. When released to the public, green sheets are pulled. Records displaying social security numbers, for example, are also "green-papered."

Regarding hate crimes, what is the difference between someone attacking me because they don't like me, and someone attacking me because I am gay?

Sean Lemieux: Historically, the ACLU has been opposed to hate crime legislation because it presents first amendment problems. You may be punishing someone for simply calling them a "fag."

Kathleen Sweeney: Hate crimes legislation is an inappropriate way to legislate fairness. The proposals for hate crimes are "out there" because for so long these crimes had been ignored. This was more of a remedial action.

Shannon Minter: Theory behind hate crimes is that if someone targets someone with a hateful intent, the harm is greater. You are not just hurting a person, but a whole community.

Bree Hartlage: Often sexuality is used to say "that person deserved it." Hate crimes bring this problem to life.

Audience comment: These comments about discrimination about gender issues -- close your eyes and listen -- the comments are apropos to being black. We need to continue to work towards equality, meet with and have dialogue with city council members;

councilors need to hear and understand what is being said. So much opposition comes from ignorance.

Audience comment: Regarding insurance matters, companies are losing money. Society is changing. Some companies, especially international companies, are realizing that they're losing talent because they are excluding GLBT employees from benefits. There are many "partners" out there that want to be protected. Another challenge is in getting people to come here to the Midwest. It's difficult when there are many news reports about Indiana and the sexual orientation discrimination in the state. Why then would out-of-staters, especially those from the GLBT community, want to come here?

Audience comment: Our firm (large firm in Indiana) is actively recruiting GLBT attorneys but the challenge is in finding GLBT attorneys. [Speaker - female] is part of a nearly invisible black, gay community in Indianapolis. She is thankful for the session. "We do have a long way to go, but I have a lot of hope." Indianapolis is moving towards becoming a more tolerant city.

Closing thoughts: One way for law firms and organizations to recruit GLBT individuals is by showing that your organization offers domestic partner benefits. In addition to domestic partner benefits, gender identity should be included in nondiscrimination policies. We need to work towards a human right's ordinance. If you have any other ideas, contact the Commission. There needs to be new strategy for combating anti-gay sentiment in the general public.

